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80-1290

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM

WILLIAM P. CLEMENTS, JR., Governor of the State of Texas, ET AL.,
Petitioners,

V.

JOHN L. FASHING, ET AL.,
Respondents.

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether provisions of the state constitution may be struck down pursuant to the equal protection clause when no fundamental right is involved and where the sole basis for such decision is that the classifications made by the state constitution are somewhat imperfect.

LIST OF PARTIES

Petitioners

William P. Clements, Jr.
Mark White
George W. Strake, Jr.

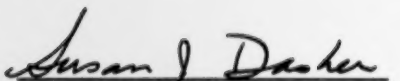
Respondents

John L. Fashing
Jose J. Baca
Walter McGhee
C. Johnny Ybarra
Donovan Webb
Owen Short
Pat Haggerty
William V. Fashing
Loretta Doerr
Arthur Abraham
Sam Snoddy
James L. Lee
Bill Eubank
George C. Johnston
Jim Heathman
Lupe Manago
Juan S. Martinez
Luisa G. Ybarra
Frank Escobar
Phillip E. Bargman
Herbert Erhlich
Michael T. Milligan
Edward W. Dunbar
Roger L. Moore
C. John Galvan

The undersigned counsel certifies that the following attorneys have an interest in the outcome of this case on behalf of their respective clients:

For the Petitioners: Mark White, Attorney General of Texas; John W. Fainter, Jr., First Assistant; Richard E. Grav. III. Executive Assistant; Paul R. Gavia, Chief, State and County Affairs; and Susan J. Dasher, Assistant Attorney General.

For the Respondents: Raymond C. Cabellero.



SUSAN J. DASHER
Assistant Attorney General

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JURISDICTIONAL STATEMENT

TO THE HONORABLE JUDGES OF SAID COURT:

NOW COME William P. Clements, Jr., Governor of the State of Texas; Mark White, Attorney General of Texas; and George W. Strake, Jr., Secretary of State for the State of Texas, by and through their attorney, Susan J. Dasher, Assistant Attorney General of Texas, and file this their jurisdictional statement in the above-captioned cause.

JURISDICTION

On January 23, 1980, the United States District Court for the Western District of Texas, El Paso Division, issued a judgment, memorandum opinion and order enjoining officers of the State of Texas from enforcing provisions of its constitution. The district court's order was pursuant to 28 U.S.C. §1343(3) and (4) and 42 U.S.C. §1983. The matter was appealed to the United States

Court of Appeals for the Fifth Circuit, No. 80-1107, and that honorable court issued its opinion, unpublished, adopting the memorandum and opinion of the district judge on October 31, 1980.

This Court has jurisdiction pursuant to 28 U.S.C. §1254.

STATUTORY PROVISIONS

> No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office or profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extend a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected. No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected. TEX.CONST. art. 3, §18.

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under

the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature. TEX.CONST. art. 3, §19.

A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby.

A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby.

Provided, however, if any of such officers, elective or appointive, shall announce their candidacy, or shall in fact become a candidate, in any general, special or primary election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (l) year, such announcement or such candidacy shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur. TEX.CONST.art. 11,§*11.*

The following officers elected at the General Election in November, 1954, and thereafter, shall serve for the full terms provided in this Constitution:

(a) District Clerks; (b) County Clerks; (c) County Judges; (d) Judges of County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; (e) County Treasurers; (f) Criminal District Attorneys; (g) County Surveyors; (h) Inspectors of Hides and Animals; (i) County Commissioners for Precincts Two and Four; (j) Justices of the Peace.

Notwithstanding other provisions of this Constitution, the following officers elected at the General Election in November, 1954, shall serve only for terms of two (2) years: (a) Sheriffs; (b) Assessors and Collectors of Taxes; (c) District Attorneys; (d) County Attorneys; (e) Public Weighers; (f) County Commissioners for Precincts One and Three; (g) Constables. At subsequent elections, such officers shall be elected for the full terms provided in this Constitution.

In any district, county or precinct where any of the aforementioned offices is of such nature that two (2) or more persons hold such office, with the result that candidates file for 'Place No. 1,' 'Place No. 2,' etc., the officers elected at the General Election in November, 1954, shall serve for a term of two (2) years if the designation of their office is an uneven number, and for a tem of four (4) years if the designation of their office is an even number. Thereafter, all such officers shall be elected for the terms provided in this Constitution.

Provided, however, if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. TEX.CONST. art. 16§65.

STATEMENT OF THE CASE

Respondents brought this action under the Civil Rights Act of 1871, 42 U.S.C. §1983, and the Declaratory Judgment Act, 28 U.S.C. §2201 and 2202, seeking to challenge the constitutionality of Article 3, Section 19, and Article 16, Section 65, of the Constitution of the State of Texas. Some of the Respondents were public officials who sought to run for higher office but who did not want to resign their present offices in so doing. Another group of Respondents were voters who were desirous of voting for these officeholders if they sought higher office.

The matter was heard on cross motions for summary judgment in the United States District Court for the Western District of Texas, El Paso Division, on January 3, 1980, and the district court issued its judgment, memorandum opinion and order on January 23, 1980. On January 25, 1980, the district court granted the Respondents' request for an injunction. The State Petitioners filed their notice of appeal on February 4, 1980. Oral argument was heard in the United States Court of Appeals for the Fifth Circuit on October 29, 1980. The appellate court issued its opinion on October 31, 1980, which opinion is unpublished and adopts the opinion of the district court.

ARGUMENT

The sections of the Texas Constitution which are at issue in this cause provide as follows:

> No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, of this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature. TEX.CONST.art. 3, §19.

> . . . if any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled. TEX.CONST. art.16, §65.

The various constitutional provisions challenged here, as well as some not challenged,[1] identify which officeholders are affected.

Not all holders of offices are required to resign; however, the imperfection of the classification is not a basis, standing alone and when no fundamental right is at issue, for the intrusion of a federal court in the state legislative scheme.

This Court should take jurisdiction because this case implicitly stands for the proposition that there is a fundamental right to candidacy. Without using strict scrutiny to review these constitutional provisions, the court below would have been unable to find a violation of the equal protection clause.

The leading case in the Fifth Circuit on the rights of candidates for public office and their supporters is the en banc decision in *Morial v. Judiciary Com'n of State of La*, 565 F. 2d 295 (5th Cir. 1977). In its opinion, the Court of Appeals for the Fifth Circuit specifically addressed the issue of whether candidacy was a fundamental right and, relying on Supreme Court decisions, found it was not. *Morial*, at 301. The Fifth Circuit further found that the interest of voters in supporting certain political candidates is not sufficiently substantial to warrant strict scrutiny.

The Supreme Court has never declared a right to candidacy to be a fundamental right. Instead, the Supreme Court has said that "barriers standing in the path of potential candidates" do not automatically invoke the strict scrutiny standard. *Jenness v. Fortson*, 403 U.S. 431 (1971); *Bullock v. Carter*, 405 U.S. 134

[1] *See*, Article 3, Section 18, and Article 11, Section 11, which are identical resign-to-run provisions covering different officeholders.

(1972). The courts have found that the interest must be weighed with respect to "the extent and nature of the impact on voters, examined in a realistic light" in order to determine the standard to be applied. *Henderson v. Fort Worth Independent Sch. Dist.*, 526 F.2d 286, 291 (5th Cir. 1976).

The State asserted that there is no disagreement that the reason for these provisions in the Texas Constitution is to prevent conflict of interest, the prevention of abuse of office by incumbent officeholders, the assurance that the incumbents in office would give undivided attention to the offices already held and the elimination of any appearance of impropriety during and after the campaign. As the court below found, these are legitimate state interests, yet against the demonstrated showing of legitimacy, these constitutional provisions were found unnecessary to vindicate the above listed interests.

Historically, provisions limiting dual officeholding have prevailed. Indeed, Article 3, Section 19, finds its origin in a 1348 petition from the House of Commons to the king "that no person summoned to Parliament should be either a taxer, collector or receiver or the fifteenth then granted." Braden, *The Constitution of the State of Texas: An Annotated and Comparative Analysis* (1978). The language of this section has remained virtually unchanged since the first Texas constitution in 1836. In addition, Texas case law has invalidated elections and candidacies when officeholders violate the provisions of these sections. *See, Kirk v. Gordon*, 376 S.W. 2d 560 (Tex. 1964); *Lee v. Daniels*, 377 S.W.2d 618 (Tex. 1964); *Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964). *See also*, U.S.CONST. art. I, §6, cl. 2, which provides that:

> No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the

> United States, which shall have been created, or the Emoluments whereof shall have been encreased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

It bears consideration that these so-called resign-to-run statutes do not preclude candidacy. They preclude candidacy only prior to the last year of office. That particular structure is further indication of the State's concern with potential misuse of office and inattention to duties of office. Both Article 3, Section 19, and Article 16, Section 65, are reasonable exercises of the power reserved for the people of Texas to control processes of election, to prescribe qualifications for officeholders and to prevent abuse of public office. Other federal courts have rejected equal protection challenges similar to the one before the Court here. *See, Perry v. St. Pierre*, 518 F.2d 184 (2d Cir.); *Magill v. Lynch*, 560 F2d 22 (1st Cir. 1977). To invalidate provisions of the State's constitution, which constitution has been unchanged for 100 years, should be done only under the most egregious circumstances. There is no fundamental right in this cause, and the proper test, when the Court evaluated these provisions of the Texas Constitution, should have been minimal rationality. The Court's rejection of the State's interests and their necessity is offensive to concepts of federalism.

Respectfully submitted,

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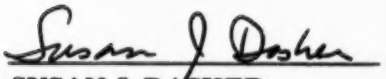

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